No. 14-1504

IN THE
Supreme Court of the United States

ROBERT J. WITTMAN, ET AL.,

Appellants,

v.

GLORIA PERSONHUBALLAH, ET AL.,

Appellees.

On Appeal From The United States District Court for The Eastern District of Virginia

BRIEF OF THE CAMPAIGN LEGAL CENTER, THE LEAGUE OF WOMEN VOTERS, THE VOTING RIGHTS INSTITUTE, AND THE NATIONAL COUNCIL OF JEWISH WOMEN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae the Campaign Legal Center, Inc. (the "CLC") is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation regarding voting rights. The CLC has served as *amicus curiae* or counsel in numerous voting rights and redistricting cases in this Court, including *Harris v. Arizona Independent Redistricting Commission*, No. 14-232; *Evenwel v. Abbott*, No. 14-940; *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion County*, 553 U.S. 181 (2008). The CLC has a demonstrated interest in voting rights and redistricting law.

Amicus curiae the League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Written consent from all parties to the filing of this brief is being submitted concurrently with this brief.

members and supporters nationwide. The League promotes an open governmental system that is representative, accountable, and responsive. The League has been a leader in seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

Amicus curiae the Voting Rights Institute at Georgetown Law ("VRI") was founded in 2015 to train the next generation of lawyers and leaders and to litigate voting rights cases throughout the nation. VRI recruits and trains expert witnesses to assist in litigation development and presentation; promotes increased local and national focus on voting rights through events, publications, and the development of web-based tools; provides opportunities and platforms for research on voting rights; and offers opportunities for students, recent graduates, and fellows to engage in litigation and policy work in the field of voting rights.

Amicus curiae the National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "[e]lection laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified."

SUMMARY OF ARGUMENT

Appellants argue that in order to show that race predominated in the drawing of a district, a plaintiff must establish that race conflicts with other principles of redistricting, including a legislature's political goals. In Appellants' view, if racial considerations cause no departure from the lines that otherwise might have been drawn for political reasons, there can be no subordination of neutral redistricting principles. This conclusion underlies not only Appellants' proposed predominance analysis, but also their insistence that all plaintiffs alleging a racial gerrymandering claim must produce an alternative plan that can equally achieve the legislature's political goals.

Appellants' argument has dangerous consequences in the context of racial gerrymandering cases—such as the present case—premised on direct evidence of racial discrimination. Appellants' proposed standard for determining racial predominance would allow the incidental political benefits of a racial gerrymander to excuse a plan—such as this one—premised on explicitly racial intent. Indeed, redistricters could set racial quotas for all districts and then later justify them simply by showing that the districts also benefit the party in power politically. If a plan's ultimate partisan effects can overcome direct evidence of racial intent, racial gerrymandering claims would largely be rendered a nullity.

Appellants' position is untenable because it sanctions the impermissible use of race as a proxy to achieve partisan gains. Under Appellants' view, so long as the intentional use of race to achieve political ends is

coextensive with the legislature's political goals, there can be no successful racial gerrymandering claim. By effectively excusing racial stereotyping on the basis of its consistency with political ends, Appellants would grant legislatures free rein to openly use racial stereotypes in redistricting.

Appellants' insistence on an alternative plan that achieves a legislature's political goals while also bringing about significantly greater racial balance would likewise stymie racial gerrymandering claims predicated on direct evidence of racial discrimination. As this Court has recognized, such alternative plans serve a useful evidentiary function for racial gerrymandering claims when those claims are premised on *circumstantial* evidence. In the absence of direct evidence of racial motivation, and in light of the strong correlation between race and politics, evidence of a conflict between race and party may be useful to dispel an equally plausible alternative explanation of partisanship. However, such a plan is unnecessary to ferret out evidence of racial discrimination when there is already *direct* evidence of such intent. To impose an alternative plan requirement upon all plaintiffs raising racial gerrymandering claims, even those relying on direct evidence, would simply adopt Appellants' erroneous predominance analysis in another form.

This Court should decline Appellants' invitation to radically reshape racial gerrymandering doctrine and permit the explicit use of race as a proxy to achieve political goals.

ARGUMENT

I. As The District Court Found, Direct Evidence Shows That Race Predominated In The Creation Of District 3.

A plaintiff bringing a racial gerrymandering claim under *Shaw v. Reno*, 509 U.S. 630 (1993), can establish that race predominated in the formation of a district either through direct evidence of legislative purpose, or circumstantial evidence based on a district's shape and demographics. Here, Appellees established, and the district court found, direct evidence of racial predominance in the creation of District 3, based primarily on the admissions of the redistricting plan's primary drafter.

A. *Shaw* Claims May Be Established Either Through Direct Or Circumstantial Evidence.

The Equal Protection Clause prevents states from "purposefully discriminating between individuals on the basis of race." *Shaw*, 509 U.S. at 642. In the redistricting context, the Equal Protection Clause protects individuals against "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Id.* at 640 (internal quotation marks omitted) (alterations in original).

To bring a claim of racial gerrymandering, a plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Race predominates in the redistricting process

if the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once a plaintiff establishes that the legislature used race as a predominant factor in drawing a district's boundaries, the Equal Protection Clause requires the boundaries to be narrowly tailored to serve a compelling state interest. *Shaw*, 509 U.S. at 686. Otherwise, the challenged district violates the Constitution.

At the first stage of this analysis, *Shaw* plaintiffs can prove that race was the predominant factor in districting in two ways, either through "circumstantial evidence of a district's shape and demographics" or through "more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 916.

With respect to direct evidence of racial gerrymandering, the Court has looked primarily to evidence of legislators' beliefs and communications. "[S]trong, perhaps overwhelming" direct evidence of racial predominance exists where legislators make clear that "a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015). Where direct evidence establishes that race was the criteria that "could not be compromised," *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("*Shaw II*"), the district court need only determine whether that use survives strict scrutiny.

However, in the absence of sufficient direct evidence of race-based gerrymandering, a plaintiff may turn to more equivocal "circumstantial evidence of a district's shape and demographics" to show that race predominated. *Miller*, 515 U.S. at 916. Circumstantial evidence can consist of district maps as well as "statistical and demographic evidence with respect to the precincts that were included within [the challenged district] and those that were placed in neighboring districts." *Hunt v. Cromartie*, 526 U.S. 541, 547-48 (1999).

B. Strong Direct Evidence Of Legislative Purpose Establishes The Predominance Of Race In The Formation Of District 3.

Here, the three-judge court found that race was the predominant factor in the drawing of District 3 based on direct evidence of legislative purpose. This finding is not clearly erroneous. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Indeed, such evidence mirrors the direct evidence of racial motive accepted in this Court's prior cases, including most recently in *Alabama Legislative Black Caucus*, 135 S. Ct. at 1271-72.

As the district court found, the legislative record is "replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan." J.S. App. 18a. Most prominently, Delegate Janis, the author of the challenged plan, expressly and repeatedly stated that his "primary focus" in designing District 3 was to ensure that it "maintained at least as large a percentage of African-American voters as had been in the district under the Benchmark Plan." *Id.* at 22a. In order to achieve this "paramount" concern, the

legislature adopted a mechanical requirement that the district be comprised of no less than 55% Black Voting Age Population ("BVAP"). *Id.* at 20a, 23a.

Although Delegate Janis's purported reason for setting this racial target was compliance with the Voting Rights Act ("VRA"), *id.* at 23a, the record reveals that Delegate Janis sought to comply with federal law through a "nonnegotiable," and unnecessary, racial quota for District 3. *Id.* at 22a-23a (quoting Delegate Janis: "[W]e can have no less [percentage of African-American voters] than percentages that we have under existing lines . . . ." (alterations in original)). When pressed about whether there was "any empirical evidence whatsoever that 55[% BVAP] is different than 51[%] or 50[%]" or if it was "just a number that has been pulled out of the air," Delegate Janis admitted that he did not know if such a rigid minimum was actually necessary to maintain the minority community's ability to elect its candidate of choice in District 3. *Id.* at 21a (alterations in original). The legislature never conducted any functional analysis, nor any analysis at all about the minority community's ability to elect in District 3. *Id.* at 9a.

Yet the Virginia legislature could hardly claim any genuine misunderstanding that the VRA required it to mandate a 55% BVAP in order to avoid a finding of impermissible retrogression. The Department of Justice had previously granted preclearance for iterations of District 3 with BVAPs lower than 55%. J.A. 580-83. And in this very redistricting cycle, when the Virginia State Senate drew its redistricting plan based on the 2010 census, it reduced the BVAP in all

majority African-American Senate districts below 55% and nevertheless received preclearance for its plan. J.A. 626-27; Int. Ex. 34 at 24. Hence, the Virginia legislature knew, through first-hand experience, that compliance with the VRA did not require the use of a fixed 55% BVAP floor.

Such direct evidence of racial predominance mirrors the evidence relied upon in prior cases. Most recently, in *Alabama Legislative Black Caucus*, a nearly identical use of "mechanical racial targets" in redistricting was deemed "strong, perhaps overwhelming, evidence that race did predominate as a factor." *Alabama Legislative Black Caucus*, 135 S. Ct at 1271. There, echoing the circumstances here, the Court relied on evidence that "[t]he legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible." *Id.* There, too, the Alabama legislature—just like the Virginia legislature—conducted no "functional analysis" of minority ability to elect, relying instead on "a mechanically numerical view as to what counts as forbidden retrogression." *Id.* at 1272-73 (internal quotation marks omitted). Likewise, in *Shaw II*, testimony from the principal draftsman of a redistricting plan that two districts were created to "assure black-voter majorities" provided strong "direct evidence of the legislature's objective." *Shaw II*, 517 U.S. at 906 (internal quotation marks omitted).

II. Post-Hoc Partisan Effects Cannot Override Direct Evidence Of Racial Gerrymandering.

Appellants dismiss this classic direct evidence of racial gerrymandering as immaterial, arguing that it is irrelevant "whether the Legislature rank-ordered 'race' above 'politics'" so long as politics can *also* "explain[] the district." Appellants' Br. at 30. Under this view, race must always be in actual conflict with a legislature's political goals in order to predominate. *See* Appellants' Br. at 15 (asserting that "a *Shaw* violation cannot conceivably be found . . . where any potential subordination [of neutral principles to race] clearly serves the Legislature's 'legitimate political objectives'"). Where lines explicitly drawn on the basis of race can be later justified by reliance on politics, Appellants argue there can be no *Shaw* violation.

Appellants' position effectively eviscerates this Court's racial gerrymandering doctrine. Under Appellants' position, the predictable partisan benefits from a racial gerrymander would excuse even the most egregious direct evidence of racial discrimination. Appellants' new proposed standard for predominance—wherein race never predominates if it is coextensive with political goals—ignores the clear guidance of *Shaw* and its progeny. By asking the wrong question—what *can* explain the district rather than what *actually* motivated the legislature when drawing the district—Appellants arrive at the wrong answer.

As this Court has recognized, racial gerrymanders often resemble partisan gerrymanders given the strong correlation between race and party. *Easley*, 532 U.S. at 257 ("That is because race in this case correlates closely

with political behavior."); *see also* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 Harv. L. Rev. Forum 58, 61 (2014) (noting that "[w]hen party and race coincide, as . . . they do today, it is much harder to separate racial and partisan intent and effect"). Such a correlation, standing alone, is obviously insufficient to show a *Shaw* violation. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify."). However, by the same logic, such a correlation, standing alone, should be equally insufficient to *defeat* a *Shaw* claim.

Just as it is possible to draw a compact district that discriminates on the basis of race, *see Miller*, 515 U.S. at 915, it is possible (and indeed likely) that a district drawn on the basis of race will also have partisan benefits. While this Court has held that the pursuit of political goals in districting, based on political data, is not unconstitutional "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact," *Hunt*, 526 U.S. at 551 (emphasis omitted), the Court has never held that purposeful racial gerrymandering is constitutional just because packing African-American voters also benefits Republican legislators.

The key question in a *Shaw* claim is which criteria "could not be compromised." *Shaw II*, 517 U.S. at 907 ("That the legislature addressed [other] interests does not in any way refute the fact that race was the

legislature's predominant consideration. Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made."). In other words, the key inquiries are *why* the legislature drew the district and *how* it went about doing so. The fact that political goals can explain a district's boundaries after the fact, or that there is no conflict between race and politics, does not negate direct evidence demonstrating that race was the "criterion that, in the State's view, could not be compromised." *Id.* at 907.

As discussed above, the district court here found direct and irrefutable evidence of a racial motive in drawing the districts. Direct evidence of partisan motivation, by contrast, is missing from the record. Indeed, when asked whether he had "any knowledge as to how this plan improves the partisan performance of . . . incumbents in their own district," the plan's author Delegate Janis stated that "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." J.A. 456. Nevertheless, Appellants now ask the Court to overlook direct evidence of racial target-setting, and assume that a partisan motive existed in the drawing of the district simply because the chosen boundaries have the *effect* of conferring a partisan benefit.

Given the strong correlation between race and partisanship, Appellants' reasoning would permit virtually any purposeful use of race in redistricting so long as there were (as there are likely to be)

overlapping incidental political benefits. Appellants effectively ask the Court to assume that partisan motivation is not only a predominant factor in this plan, but that it is the predominant factor in *every* redistricting plan in which race and party are linked. The Court should decline Appellants' invitation to accept post-hoc partisan rationalizations. A partisan explanation is not talismanic and the ultimate partisan benefits of a plan cannot save a blatant racial gerrymander.

III. Permitting The Purposeful Use Of Race As A Proxy For Politics Offends The Constitution.

Beyond simply allowing incidental partisan effects to excuse direct evidence of a racial gerrymander, Appellants' proposed standard for predominance would actually sanction the use of race as a proxy for political affiliation, in violation of this Court's precedent. Under Appellants' theory, purposeful racial gerrymandering to achieve political ends is constitutional so long as it is effective. That cannot be the law.

As part of their predominance analysis, Appellants contend that the use of racial classifications is permissible so long as it is in service of partisan goals. *See* Appellants' Br. at 53 (asserting that "*Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles"). As long as lines drawn purposefully on the basis of race do not differ from lines that might have been drawn on the basis of politics, Appellants believe there is no *Shaw* violation. Appellants' Br. at 15 ("Since race therefore causes no departure from the lines that would be drawn absent

race, it cannot subordinate those race-neutral line-drawing principles.").

This argument flies in the face of this Court's prohibition on the use of race as a proxy for political affiliation. This Court has repeatedly and emphatically held that the purposeful use of race data to achieve partisan goals trades on impermissible racial stereotypes and violates the Equal Protection Clause. Indeed, "where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates." *Miller*, 515 U.S. at 920 (quoting *Shaw*, 509 U.S. at 647); *Easley*, 532 U.S. at 257 (reiterating that a legislature may not "defend its districting decisions based on a 'stereotype' about African-American voting behavior"); *id.* at 266-67 (Thomas J., dissenting) ("It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters."); *cf. Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence.").

The use of racial classifications for political ends is precisely the type of line-drawing that "may balkanize us into competing racial factions . . . threaten[ing] to carry us further from the goal of a political system in which race no longer matters." *Shaw*, 509 U.S. at 657. Such racial stereotyping in order to achieve partisan goals not only employs unconstitutional assumptions and racial stereotypes, but also impermissibly targets and diminishes minority voting power. Accordingly,

this Court has affirmed that partisan goals do not immunize purposeful attempts to limit minority voting power. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."). Racial gerrymandering is not constitutional simply because the legislature chooses to sort minority voters based on anticipated benefits to Republican legislators.

Appellants' proposed standard for predominance would excuse such discrimination, even when supported by direct evidence. Indeed, Appellants apparently see no problem with the use of race so long as it serves political goals, essentially elevating the goal of partisan gerrymandering to the ranks of a compelling government interest. *See* Appellants' Br. at 18 ("[E]ven assuming *arguendo* that the Legislature required an inflexible 55% (or 53%) BVAP 'floor,' this could not violate *Shaw* because achieving that floor was the best . . . way to accomplish the Legislature's conceded partisan and incumbency protection objectives."). However, it is precisely this distinction, between the use of political data to serve partisan goals and the use of race to serve the same partisan goals, that marks the line between permissible and impermissible gerrymandering. As this Court has made clear: "If the State's goal is otherwise constitutional political gerrymandering, it is free to use . . . political data . . . to achieve that goal regardless of its awareness of its racial implications . . . . But to the extent that race is used as a proxy for political characteristics, a racial

stereotype requiring strict scrutiny is in operation." *Bush*, 517 U.S. at 968. By excusing such racial stereotyping based on the ultimate political gains, Appellants would allow redistricting authorities to openly use race as a proxy for political affiliation.

Such a concern is not merely speculative. To the extent Appellants offer evidence that the boundaries of District 3 were motivated by politics, it appears these partisan gains were achieved through the impermissible use of racial stereotypes. Indeed, in arguing that political goals actually motivated the formation of District 3, Appellants effectively concede the use of race as a proxy for political affiliation. *See* Appellants' Br. at 19 (explaining that "preserving District 3's . . . BVAP was a political and incumbency-protection *necessity* because any serious . . . reduction in BVAP would send a significant number of overwhelmingly Democratic voters into the four adjacent districts, *all* of which had Republican incumbents"). Given the admission of Delegate Janis that he did not consult partisan performance data in drawing the district and instead consulted racial data, J.A. 456, it is clear that race was used as a proxy for political affiliation. That it may have been in this instance a reliable proxy does not make the practice any less odious.

Appellants' proposed predominance standard—requiring that race and party point in opposite directions—would eliminate the critical distinction this Court has repeatedly emphasized between lines drawn based on political data, with racial effects, and lines drawn based on racial stereotypes for political ends.

Such a standard would sanction the open use of race as a proxy for politics so long as it is effective. This result is at odds not only with all of the Court's racial gerrymandering precedent but also with the core tenet of the Equal Protection Clause.

IV. An Alternative Plan Is Unnecessary Where, As Here, Direct Evidence Establishes The Predominance Of Race In Redistricting.

Appellants attempt to support their position by arguing that this Court's opinion in *Easley v. Cromartie* requires all "*Shaw* plaintiffs [to] produce an alternative plan that 'at the least' achieves the legislature's 'legitimate political objectives' and 'traditional districting principles' while bringing about 'significantly greater racial balance' than the challenged district." Appellants' Br. at 27 (quoting *Easley*, 532 U.S. at 258). This is just another way of demanding that there be a conflict between race and politics for a *Shaw* claim to succeed. But *Easley* does not require an alternative plan in cases, such as this, where there is direct evidence of racial discrimination. In arguing otherwise, Appellants distort an evidentiary rule useful in cases premised on circumstantial evidence, and attempt to transform it into a legal element of all *Shaw* claims.

Since the sort of "[o]utright admissions of impermissible racial motivation" that occurred here "are infrequent," *Hunt*, 526 U.S. at 553, this Court has developed a jurisprudence focused on how *Shaw* plaintiffs can prove their claims through circumstantial evidence. In particular, *Hunt* and *Easley* address how courts should resolve racial gerrymandering cases

based primarily on circumstantial evidence that "tend[s] to support both a political and racial hypothesis" due to the strong correlation between race and political affiliation. *Hunt*, 526 U.S. at 550; *see also id.* at 547 ("Appellees offered only circumstantial evidence in support of their claim."); *Easley*, 532 U.S. at 253-54 (finding the minor direct evidence insufficient and looking to circumstantial evidence of predominance).

In this subset of cases, where no direct evidence establishes the predominance of race, and race and party are highly correlated, an obvious factual issue arises as to which factor predominated. Thus, the Court has held that plaintiffs *in these cases* can overcome this factual barrier by providing an alternative plan that achieves the asserted political objectives with greater racial balance. *Easley* 532 U.S. at 258 (requiring an alternative plan "[i]n a case *such as this one* . . . where racial identification correlates highly with political affiliation" (emphasis added)).

The Court's concern in *Easley* was evidentiary. *Id.* at 241 ("The issue in this case is evidentiary."). In light of the strong correlation between race and party, where direct evidence of racial discrimination is lacking, a *Shaw* plaintiff must put forth some evidence that race rather than party provided the basis for the district, in order to dispel the equally plausible partisan explanation. Such evidence is established by showing an alternative plan revealing a conflict between racial and partisan motivations. The *Easley* rule makes perfect sense in its proper context as an evidentiary requirement to ferret out racial rather than political

motives in circumstantial cases. However, this evidentiary concern is absent in cases, such as this one, where direct evidence already establishes that race was the predominant factor in the creation of a district. *Easley* does not stand for the proposition that once plaintiffs have met their burden of proving racial intent, they must additionally disprove all other potential post-hoc explanations for the result.

Appellants' insistence on an alternative map as an element of a *Shaw* claim mirrors the flawed argument rejected by this Court in *Miller*. There, the district court found that race was the predominant factor in drawing a district based on direct evidence of intent. 515 U.S. at 910-11. Nonetheless, the appellants argued that "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." *Id.* at 910. This Court correctly rejected the argument, which sought to transform the bizarre shape evidentiary holding in *Shaw* into an element of a racial gerrymandering claim: "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake . . . was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913. Likewise, the alternative plan identified in *Easley* is relevant not because it is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it offers pivotal evidence when circumstantial evidence raises a factual issue as to whether race rather than politics motivated the district lines.

Ultimately, Appellants' position that *Easley* imposes an alternative plan requirement upon all *Shaw* plaintiffs is simply a reformulation of their erroneous predominance analysis. Appellants' would have this Court demand a conflict between race and other redistricting principles, not simply as an evidentiary tool to disaggregate race and party in ambiguous cases, but rather as a means to override clear evidence of racial intent. Just as it should reject Appellants' flawed predominance standard, the Court should also decline to adopt Appellants' unnecessarily broad application of *Easley*'s alternative plan requirement.

CONCLUSION

For the foregoing reasons, the decision of the three-judge court should be affirmed.

Respectfully submitted,

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